LA (Migration) [2019] AATA 1038 (9 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Dr KYUNGIN LA
CASE NUMBER:	1811708
DIBP REFERENCE(S):	BCC2017/2028494
MEMBER:	Catherine Carney-Orsborn
DATE:	9 January 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision the power to cancel the visa under s.109 was not enlivened.

1. Statement made on 09 January 2019 at 3:24pm

CATCHWORDS

MIGRATION – cancellation – Skilled Nominated (Permanent) (Class SN) visas – Subclass 190 Skilled – Nominated – applicant provided a bogus document – valid notice of cancellation – notice directed the applicant to respond to incorrect Act section – incorrect statutory period for response to notice – power to cancel the visa did not arise – decision under review set aside

LEGISLATION

Migration Act 1958, ss 5(1), 97-105, 107-109

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 190 - Skilled - Nominated visa under s.109(1) of the *Migration Act 1958* (the Act).

3. The delegate cancelled the visa on the basis that the applicant provided a bogus document pursuant to s103. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.

4. The applicant appeared before the Tribunal on 8 January 2019 to give evidence and present arguments.

5. The applicant was represented in relation to the review by her registered migration agent.

6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.

8. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

Did the notice comply with the requirements in s.107?

9. In the present case, there is a question as to whether the notice issued by the Minister's delegate complied with s.107.

10. The Tribunal is first obligated to consider if the notice complied with s.107.

11. In submissions provided to the Tribunal the applicant's representative submitted that the delegate's notice was misleading as under the heading "What you can do" it asked the applicant to respond to why she did or did not comply with Section 101(b), which is in relation to no incorrect answers being provided on the visa application. They submit that the delegate should have directed the applicant to respond to the issue in relation to section 103 which relates to a bogus document.

12. The representative further submits that the notice was flawed as the notice set out a time period of 5 working days to respond to the notice. The representative submits that the statutory period for a permanent visa is 14 days.

13. At the hearing the applicant claimed that she only responded to section 101(b) as she was rushed and confused by the letter. She further claims that although the letter refers to the legislation being attached it was not attached. She claimed that she was rushed and confused and therefore did not address the relevant issue of s.103.

14. The Tribunal finds that the applicant is being disingenuous in her evidence that she was confused and only addressed s.101(b) in her response.

15. The Tribunal has the submission before it which the applicant provided to the Department in response to the s.107 notice. The response from the applicant which was sent to the Department has as its first sentence

> "for the reasons set out in detail below, I respectfully submit that I did not fail to comply with section 103 of the Migration Act"

16. She then went on to refer to s.103 throughout that response.

17. The Tribunal has considered the s.107 notice. The Tribunal is satisfied that the notice included particulars of the possible non-compliance.

18. The applicant is a well-educated young woman and her previous submissions clearly indicate that she addressed the relevant issue being a bogus document and s.103 was clearly set out. The Tribunal has concerns about the applicant's credibility and does not accept that the s.107 notices' reference to s.101(b) confused her and she only addressed s.101(b).

19. The applicant further claimed that she was not given the statutory time frame to respond.

20. It is clear that the s.107 notice prepared by the delegate gave 5 working days for a response.

21. The visa that is being considered is a permanent visa.

22. The relevant legislation is attached to this decision.

23. s.107(1)(b) states that the notice period is "within a period stated in the notice as mentioned in subsection (1A),:.."

24. s.107 (1A) indicates a period of 14 days is required for a permanent visa.

25. S.108 and s.109 both refer to the decision to cancel only being considered after consideration of the response to the notice about the non-compliance which is given in a way required by s.107.

26. The Evidence before the Tribunal indicates that the notice about non-compliance was not given in the way required by s.107 as the statutory period for response was not given.

27. As the s.107 notice did not provide the correct statutory period for a permanent visa the Tribunal has unfortunately no option but to find that the notice did not comply with the requirement of s.107 and therefore is not valid.

28. For these reasons, the Tribunal finds that the notice was not a valid notice for the purposes of s.107. As a valid s.107 notice is a precondition to the exercise of the power under s.109, the power to cancel the visa did not arise.

29. The Tribunal has considered the information before it and has found that the notice purportedly issued under s.107 of the Act was not a valid notice. As a valid s.107 notice is a precondition to the exercise of the power under s.109, there was no power to cancel the visa. It follows that the delegate's decision to cancel the visa must be set aside.

DECISION

30. The Tribunal sets aside the decision under review and substitutes a decision the power to cancel the visa under s.109 was not enlivened.

Catherine Carney-Orsborn
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

(1) In this Act, unless the contrary intention appears:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce][*]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced][1] or provided.

107 Notice of incorrect applications

(1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

(a) giving particulars of the possible non-compliance; and

(b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:

(i) if the holder disputes that there was non-compliance:

(A) shows that there was compliance; and

(B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

(ii) if the holder accepts that there was non-compliance:

(A) give reasons for the non-compliance; and

[*]This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

[1]

(B) shows cause why the visa should not be cancelled; and

(c) stating that the Minister will consider cancelling the visa:

(i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or

(ii) if the holder gives the Minister a written response within that period—when the response is given; or

(iii) otherwise—at the end of that period; and

(d) setting out the effect of sections 108, 109, 111 and 112; and

(e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and

(f) requiring the holder:

(i) to tell the Minister the address at which the holder is living; and

(ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.

(1A) The period to be stated in the notice under subsection (1) must be:

(a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or

(b) otherwise—14 days.

(1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:

(a) visas of a stated class; or

(b) visa holders in stated circumstances; or

(c) visa holders in a stated class of people (who may be visa holders in a particular place); or

(d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.

(2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

(a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and

(b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

(1) The Minister, after:

(a) deciding under section 108 that there was non-compliance by the holder of a visa; and

(b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and

(c) having regard to any prescribed circumstances;

may cancel the visa.

(2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.